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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA, }  
8 Respondant, } NO. CR-09-0157-WFN-1  
9 -vs- } ORDER  
10 JULIO LAGOS-MENDOZA, a/k/a }  
11 Jose Garcia-Renterin, }  
12 Movant. }

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13 Before the Court is Mr. Lagos-Mendoza's pro se 28 U.S.C. § 2255 Motion to Vacate,  
14 Set Aside or Correct Sentence (ECF No. 41). On February 10, 2011, the Court dismissed  
15 grounds one and three, but requested that the Government answer grounds two and four.  
16 Prior to the Government's response, Mr. Lagos filed a supplement which included five  
17 additional grounds. The Government responded to both the original motion and the  
18 additional grounds. The Court outlined the procedural history in the last order and will not  
19 repeat it here.

20 ANALYSIS

21 Each of Mr. Lagos' claims allege ineffective assistance of counsel. Mr. Lagos must  
22 prove that counsel's performance was deficient and that he was prejudiced by this deficient  
23 performance. *United States v. Strickland*, 466 U.S. 668, 687 (1984). Courts must "indulge  
24 a strong presumption that counsel's conduct falls within the wide range of reasonable  
25 professional assistance; that is, the defendant must overcome the presumption that, under  
26 the circumstances, the challenged action might be considered sound trial strategy."

1 *Strickland*, 466 U.S. at 689. "A fair assessment of attorney performance requires that every  
2 effort be made to eliminate the distorting effects of hindsight, to reconstruct the  
3 circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's  
4 perspective at the time." *Id.* at 689 (internal citations omitted). In order to show prejudice,  
5 Mr. Lagos must show that but for counsel's errors the results of the proceeding would have  
6 been different. *Id.* at 694. The Court expressed doubt as to whether Mr. Lagos' claims  
7 support a finding of prejudice. After reviewing the complete briefing, the Court finds that  
8 the initial analysis is correct.

9 In ground two Mr. Lagos alleges that defense counsel's performance was ineffective  
10 because defense counsel failed to advise him of the effect of conviction on his immigration  
11 status. First, the Court recognizes that failure to inform a client of likely deportation  
12 upon a finding of guilty in a criminal proceeding can constitute ineffective assistance.  
13 *Padilla v. Kentucky*, 130 S.Ct. 1473, 1483 (2010). However, in *Padilla*, defense  
14 counsel assured their client that deportation was not a necessary result of conviction.  
15 Mr. Lagos does not allege that defense counsel addressed the issue at all. Further, as  
16 the Government indicated, Mr. Lagos is subject to deportation based on charges other  
17 than the § 1326 charge. Thus, even if defense counsel's performance was deficient,  
18 Mr. Lagos cannot show prejudice because the § 1326 charge had no effect on his deportation.  
19 Lastly, from a practical perspective, Mr. Lagos must have had some inkling that he was  
20 not going to be permitted in the country due to the nature of the charges as well as his  
21 prior removals/deportations.

22 In ground four, Mr. Lagos alleges defense counsel's performance was deficient  
23 because he failed to advise Mr. Lagos of the possibility of getting credit for time served.  
24 Even if this allegation is true, Mr. Lagos cannot show prejudice. As the Government argues,  
25 the district court cannot calculate the exact time for credit for time served, the BOP has sole  
26 discretion. Further, whether or not defense counsel addresses the issue of credit for time

1 served, the statute indicates that, "A defendant shall be given credit toward the service of a  
2 term of imprisonment . . . " so Mr. Lagos should receive credit for time served so long as the  
3 time served is not on the state sentence. Mr. Lagos was still serving time on his state  
4 sentence at the time of filing the § 2255 Motion so the BOP may not have calculated his time  
5 served at the time of filing of the Motion. Mr. Lagos cannot show prejudice.

6 Mr. Lagos raised additional grounds following his initial Motion; these grounds are  
7 defense counsel's (5) failure to properly investigate and object to sentence based on prior  
8 crimes; (6) defense counsel's failure to complete investigations particularly about when  
9 Mr. Lagos' sentence runs; (7) failure to correct the Court when the Court made an error;  
10 (8) failure to accurately predict whether the sentences for the state charge and federal  
11 charge would run concurrently or consecutively; and (9) failure to investigate criminal  
12 history. The Court grants Mr. Lagos' request to include these grounds in his original § 2255  
13 Motion; however, the Court finds that these grounds do not support granting Mr. Lagos'  
14 Motion.

15 In the fifth and ninth grounds, Mr. Lagos complains that defense counsel failed to  
16 properly investigate, but does not to mention anything that defense counsel missed when  
17 doing pretrial investigations. Further, he complains that defense counsel did not object  
18 when the Court properly took into account Mr. Lagos' criminal history score when  
19 determining the sentencing range. Since Mr. Lagos provides no factual support for his  
20 claims of failure to investigate and calculating the criminal history score is mandatory for  
21 sentencing, this claim must fail.

22 The sixth ground also lacks merit because even if the alleged deficient performance  
23 occurred, Mr. Lagos cannot show prejudice. Counsel's determination of the exact time and  
24 place each sentence will be served would not have effected Mr. Lagos' requirement to serve  
25 the time he was sentenced to by this Court and state court. Further, while counsel could have  
26 estimated the time served and attempted to give a ballpark estimate, credit for time served

1 and the length of sentence is ultimately out of the hands of defense counsel so his  
2 performance could not have prejudiced Mr. Lagos.

3 In the seventh ground, Mr. Lagos complains that defense counsel failed to object to  
4 Court errors, but did not address what errors he alleged occurred. Due to this omission, there  
5 are no facts that support Mr. Lagos' claim, so the sixth ground must fail.

6 Lastly, in the eighth ground, Mr. Lagos complains that defense counsel inaccurately  
7 predicted whether the Court would impose a concurrent sentence with the state charge. Even  
8 if defense counsel was confident that the Court would impose concurrent sentences, Mr.  
9 Lagos does not allege that defense counsel made any promises about the final resolution.  
10 Certainly if they discussed the issue, Mr. Lagos was surely aware it was possible that the  
11 Court may rule differently. Defense counsel mis-guessing the final result led to no prejudice  
12 because no matter what defense counsel anticipated might happen, the ultimate disposition  
13 was not in his control.

14 In addition to raising several additional grounds, Mr. Lagos also requested that the  
15 Court re-open his case for direct appeal. The Court lacks authority to make such an order  
16 under these circumstances.

#### 17 **CERTIFICATE OF APPEALABILITY**

18 An appeal of this Order may not be taken unless this Court or a Circuit Justice issues  
19 a certificate of appealability, finding that "the applicant has made a substantial showing of  
20 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a showing that  
21 "reasonable jurists would find the district Court's assessment of the constitutional claims  
22 debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If a claim is dismissed  
23 on procedural grounds the Court must determine whether jurists of reason would find it  
24 debatable whether the petition states a valid claim of the denial of a constitutional right.  
25 *Slack*, 120 S. Ct. at 1604. Based on the Court's preceding analysis, the Court concludes: 1)  
26 that the Movant has failed to make a substantial showing of a denial of a constitutional right

1 and 2) that jurists of reason would not find it debatable whether the Court was correct in any  
2 substantive or procedural ruling. Thus a certificate of appealability should not issue.

3 Accordingly,

4 The Court has reviewed the file and Motions and is fully informed. Accordingly,

5 **IT IS ORDERED** that:

6 1. Mr. Lagos' Motion Under 28 U.S.C. § 2255, filed January 25, 2011, **ECF No. 41**,  
7 is **DENIED WITH PREJUDICE**.

8 2. Mr. Lagos' Motion for Appointment of Counsel, filed April 12, 2011, **ECF No. 48**,  
9 is **DENIED**. Counsel is not required because Mr. Lagos' direct appeal is not ongoing. It was  
10 dismissed on February 8, 2011. The Court notes that Mr. Lagos had appointed counsel for  
11 the appeal, Mr. Bryan Whitaker.

12 The District Court Executive is directed to:

- 13 • File this Order and provide copies to pro se Movant and to the Government;  
14 • Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice  
15 of Appeal that a certificate of appealability is **DENIED**; and  
16 • **CLOSE** the corresponding civil file, CV-11-0037-WFN.

17 The District Court Executive is directed to file this Order and provide copies to  
18 counsel.

19 **DATED** this 22nd day of June, 2011.

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22 06-21

21 s/ Wm. Fremming Nielsen  
22 WM. FREMMING NIELSEN  
23 SENIOR UNITED STATES DISTRICT JUDGE  
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